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No. 88-.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

THOMAS H. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. On an indictment charging false statements to a bank "in connection with a request and application to settle an outstanding judgment," a charge the Court of Appeals found lacking "an essential element" of the offense —an underlying bank loan within the terms of 18 U.S.C. § 1014—are Fifth and Sixth Amendment indictment standards met by judicially deeming that essential element incorporated from the statute and noticed by the indictment's closing recital, "in violation of Title 18, United States Code, Section 1014"?

II. May the deficient indictment be so remedied by a court of appeals consistently with the Fifth and Sixth Amendments when the essential but omitted element was omitted also from the trial court's instructions to the jury that convicted the accused, i.e., that "[f]alse statements to a federally insured bank during negotiations to settle a judgment can constitute a crime under 18 U.S.C. Section 1014"?

III. On another count charging that defendant knowingly and willfully made or caused false statements to *Bank B* with intent to influence *Bank B* on a loan application to *Bank B*, and on proofs susceptible of either that finding or that he made and intended his statements only to *Bank A* by loan application he sent only to *Bank A*, did the District Court deprive the accused of Fifth and Sixth Amendment rights to a trial on that indictment by instructing the jury, "It is not necessary, however, to prove . . . that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank"?

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OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is reported at 862 F.2d 1512 and is reprinted in the Appendix at A1-13. The order of the District Court for the Middle District of Florida, denying petitioner's pretrial motion to dismiss counts One to Three for failure to state an offense, is reported at 670 F. Supp. 337 and is reprinted at A-18-24.

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JURISDICTION

The Court of Appeals decision affirming petitioner's convictions was entered January 12, 1989. A timely petition for rehearing was denied by that Court February 22, 1989 (A13). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 20.1.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Sixth Amendments to the United States Constitution provide in relevant part:

> No persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . .

Title 18 U.S.C. § 1014 defines the offense in relevant part as follows:

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by the renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years or both.

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STATEMENT OF THE CASE

Jurisdiction of this criminal prosecution was originally founded in the District Court by 18 U.S.C. § 3231.

Facts material to the consideration of Questions I and II.

The superseding indictment charged in counts One to Three, quoted in part 862 F.2d at 1513, and in full at A14-17, that petitioner Greene on three occasions knowingly and willfully made certain materially false statements

> in connection with a request and application to settle an outstanding judgment of $123,413.58, obtained by [the bank] against him, with intent to and for the purpose of influencing [the bank] . . . .

After a semicolon setting off all the prior text, each count concluded with the phrase, "in violation of Title 18, United States Code, Section 1014" (A14-17).

Greene moved the District Court to dismiss those counts for failure to state an offense because "a request

and application to settle an outstanding judgment'' is not a transaction within the purview of the statute (R1-62-¶13); not, that is, an ''application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor.'' 18 U.S.C. § 1014.

Opposing the motion to dismiss, the U.S. Attorney argued that the judgment referred to in the indictment was entered on a bank loan unpaid and in default (R1-71-3):

> The defendant relies on *Williams v. United States*, 458 U.S. 279 (1982), to suggest that 1014 should be narrowly construed. (Memorandum, pp. 4-7). To the contrary, Williams noted that 1014,
>
> > provides penalties for making false statements or reports in connection with loans or *other similar transactions*. (emphasis added [by the Gov't]) *Id.* pp. 289-90
>
> An application to settle a **defaulted indebtedness on such a loan, or on a judgment recovered on said loan,** fairly qualifies as a ''similar transaction.''
>
> [boldface emphasis added]

The indictment alleged no loan nor any ''defaulted indebtedness on such a loan, or on a judgment recovered on said loan.'' The prosecutor's representation was based entirely on his anticipation of proof.

The District Court denied defendant's motion to dismiss saying the transactions described was sufficiently "similar" to a credit transaction specified by the statute

to support a § 1014 prosecution. Order, 670 F. Supp. at 338, 340, A18, 23:

> A false statement made in the context of a credit transaction and a false statement made during settlement negotiations have the same detrimental effect on a bank, and therefore on the federal government insurance programs. *It does not follow that once a delinquent loan is reduced to a judgment § 1014 becomes inoperative.* Logically then, a false statement made in settlement negotiations should be considered a "similar transaction" under the statute [quoting *Williams v. United States*, 458 U.S. 279, 289-90]. (Emph. added.)

At trial, however, the Court charged the jury on the elements of the subject offense without reference to a prior loan debt or "a delinquent loan . . . reduced to a judgment." Acknowledging that "the Defense totally objects" (R18-257-20), the Court twice charged the jury without qualification that a "judgment" is a § 1014 transaction and "false statements . . . during negotiations to settle a judgment" are punishable under § 1014. The Court of Appeals quoted one of those jury charges in its Opinion, 862 F.2d at 1513, A3:

> The judge charged the jury that "[f]alse statements to a federally insured bank during negotiations to settle a judgment can constitute a crime under 18 U.S.C. Section 1014." The issue on appeal is whether section 1014 covers Greene's conduct.

In the other instruction, stating "the elements of the crime," the District Court inserted the unqualified term "judgment" in a partial list of § 1014 transactions. (R18-257-204):

> Now what are the elements of the crime. The Defendant can be found guilty of this offense only if

> the following elements are proved beyond a reasonable doubt:
>
> . . .
>
> That the Defendant made the false statement or report willfully and with intent to influence the action of the insured bank upon an application, commitment, loan, *judgment*, or any change or extension thereof. (Emph. added.)

On Greene's appeal after his conviction, the Court of Appeals affirmed, holding the indictment sufficient against his motion to dismiss. The Court first observed that the § 1014 term "application" need not mean only a *loan* application,[1] but then held that "the nature of the debt underlying the judgment" makes the transaction a crime or not under § 1014. Footnote 4, 862 F.2d at 1515, A6. The Court therefore held that no offense is stated by using the term "application" in a mere precatory sense of *requesting* something[2]—asking for a job or office space in the bank, for example, or (the Court's example) to discount a judgment won by the bank "if Greene had hit the bank with his truck." Footnote 4, 862 F.2d at 1515, A6.

The Court found that the indictment states a § 1014 offense because the judgment referred to was entered on a

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[1] 862 F.2d at 1514 fn. 2, A4. *See also United States v. Zwego*, 657 F.2d 248 (10th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); *United States v. Sackett*, 598 F.2d 739 (2d Cir. 1979), holding that an "application" need not be a written loan application. Broader usages within banking parlance have also been sustained for the § 1014 terms "commitment" and "advance". *See United States v. Pinto*, 646 F.2d 833, 838 (3d Cir.), *cert. denied*, 454 U.S. 816 (1981); *United States v. Sher*, 661 F.2d 34 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982); and *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978).

[2] The superseding indictment coupled "application" with "request": "request and application to settle an outstanding judgment" (A14-17). The first indictment had alleged only a "request to settle" (R1-1-1, 2, 3).

defaulted loan debt to an FDIC-insured bank. "There is no logical basis for a distinction between making misstatements to a bank to delay litigation and making misstatements to obtain a favorable settlement after judgment." 862 F.2d at 1515, A6. The Court thus compared Greene's case to another it had decided, Gardner's, where the Court found a § 1014 violation.[3]

The Court acknowledged that "[t]his reasoning makes the nature of the debt underlying the judgment an essential element of the case." Footnote 4, *Id.* at 1515, A6:

> For example, if Greene had hit the bank with his truck, lost a damage suit, and then lied to get a better settlement, section 1014 would not be implicated. Lying to a bank during settlement negotiations on a judgment debt is only a federal crime when a loan underlies the judgment.

After declaring the underlying loan "an essential element of the case," the Court held that the absent element was infused into the indictment by its closure phrase referring to the statute by section number in Title 18 *United States Code*. This methodology for noticing the missing element was not so much explained as exemplified, citing to *United States v. Stefan*, 784 F.2d 1093 (11th Cir.), *cert. denied*, 479 U.S. 855 (1986). *Greene*, Footnote 4, 862 F.2d at 1515, A6:

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[3] *United States v. Gardner*, 681 F.2d 733 (11th Cir. 1982). Gardner's debt was an overdraft not really a loan as the Court below said, 862 F.2d at 1514, A6; but Gardner's bank surely "advanced" funds, and Gardner gave false statements and securities inducing the bank to defer its civil action. The transaction may be expressed in § 1014 terms as an "extension" of an "advance" by "deferment of action" and an "acceptance of security." The sufficiency of the indictment was not in issue.

> Greene argues that the indictment is fatally defective for alleging only a judgment debt and failing to allege a "judgment debt arising from a defaulted loan." We find the indictment sufficiently definite and clear, certainly providing Greene with "adequate notice of the charges against him." *United States v. Stefan,* 784 F.2d 1093, 1102 (11th Cir. 1986) (indictment found adequate in spite of failure to specifically allege essential element of willfulness in prosecution under 18 U.S.C.A. § 1001).

Stefan holds that while it is "axiomatic" that "an indictment must contain every element of the offense charged," even so its typical closure language—*Greene's* "in violation of Title 18, United States Code, Section 1014" —"may be used" to give notice of essential elements stated in the statute but not in the indictment. *Stefan,* 784 F.2d at 1101-02, quoting *United States v. Chilcote,* 724 F.2d 1498, 1505 (11th Cir. 1984):

> Moreover, when the indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice.

The closure phrase in Greene's indictment thus was deemed to refer particularly to a "loan" element, one of several sorts of transactions specified by the statute as within its purview. 18 U.S.C. § 1014:

> . . . any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or *loan,* or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefore . . . . (Emphasis added)

Facts material to the consideration of Question III.

Because the Court of Appeals opinion did not address the issue presented in Question III, though it was presented to the Court of Appeals by briefs, argument and motion of rehearing, the facts material to Question III do not appear on the face of the Court of Appeals opinion. Question III is not, therefore, urged as deserving review independently of Questions I and II. Should the Court accept jurisdiction on the basis of Questions I and II, then, petitioner urges that Question III bears a natural and inseparable constitutional relationship to I and II, so is worthy of consideration also.

Count Four of the superseding indictment (A17) conventionally alleged a conventional bank loan application and charged that Greene made a false statement to influence the action of Marine Midland Bank on that application. The evidence showed that he mailed his application rather to Peoples Bank, intending it for that Bank. The Court of Appeals stated, 862 F.2d 1516 fn. 7, A9: "For an unexplained reason Greene was not charged with a section 1014 offense against Peoples Bank."

When "Peoples Bank wisely rejected Greene's application," 862 F.2d at 1515, A7, Greene's associate one Erber carried the Peoples Bank papers from Peoples Bank to Marine Midland Bank. Concerning Greene's knowledge and willfulness in this, the Court of Appeals described the proof as "somewhat equivocal but . . . sufficient to establish Greene's intent to defraud Marine Midland." 862 F.2d at 1516, A11. Moreover the Court found satisfactory evidence that "Greene knowingly and willfully ratified Erber's submission of the application" (A12).

The Court of Appeals therefore concluded that "[t]he jury could have found from the evidence before it that Greene intended to defraud Marine Midland in addition to Peoples Bank." 862 F.2d at 1517, A13.

Aside from the insufficiency of evidence, Greene urged to the Court of Appeals that the trial court deprived him of a trial on the Grand Jury's indictment for the stated offense. The indictment charged only that Greene knowingly and willfully made a false statement to influence Marine Midland. Yet, with the evidence "somewhat equivocal" as to that, the District Court charged the jury over objection, R18-257-22/25, 205, that

> It is not necessary, however, to prove . . . that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank.

The reasons for affirmance on this point were not discussed by the opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

A. Conflict with Fifth and Sixth Amendment standards established by this Court in Cruikshank, Bain, Stirone, Russell and Hamling is direct, apparent, and mature for consideration.

It was the Court of Appeals that first acknowledged a need to add to the indictment an omitted "essential element of the case": "a judgment debt arising from a defaulted loan" (862 F.2d at 1515, Footnote 4, A6). The District Court had not thought that necessary, supposing

that negotiations on a bank's judgment is a sufficiently "similar transaction" to be equivalent in law to those specified by § 1014: "Logically then, a false statement made in settlement negotiations [on a judgment] should be considered a 'similar transaction' under the statute" (670 F.Supp. at 340; A23).

It seems not unfair to say, then, that the District Court took the indictment at face value and interpolated its core element, "a request and application to settle an outstanding judgment," into the statute; whereas the Court of Appeals took the statute at face value and interpolated one of *its* essential elements, "a loan underlies the judgment," into the indictment.

The latter formula particularly, where the nexus of loan and judgment is made both "essential" and explicit, glosses over doubt that § 1014 envelops a state court judgment simply because the debt was bank credit in a former life.[4]

But this expansive interpretation of § 1014 may not be a good enough reason to grant the writ. The urgent reasons for doing so are the grave constitutional implications

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[4] Section 1014 does not mention a "judgment" among its several varieties and permutations of bank credit. The history of § 1014 over 50 years indicates a purpose to protect communications on which banks must and do rely in day-to-day credit transactions. A judgment debtor's predictable poor-mouthing (*see, e.g.*, the indictment A14 et seq.) is more susceptible of testing by subpoena and post-judgment processes in aid of execution. By the Court of Appeals reasoning, the debtor's lawyer "falsely" arguing to the banker's lawyer that his client "was unable to pay the entire amount of the judgment, whereas in truth and in fact . . . he was able to pay the entire amount" (count One, A14) commits a § 1014 crime.

of a Court declaring a loan/judgment nexus the essential element that makes a § 1014 offense, then holding that the Grand Jury indictment need not set it forth. In practical terms, the Court of Appeals has cured the omission by a form of judicial notice upon ordinary closure language that was placed in the indictment to comply with F.R.Cr.P. 7(c).[5]

Only if "a loan underlies the judgment," the Court of Appeals held, is there a § 1014 offense. Certainly then, as the Court acknowledged, "[t]his reasoning makes the nature of the debt underlying the judgment an essential element of the case," 862 F.2d at 1515 fn. 4, A6. And the closure phrase, "in violation of Title 18, United States Code, Section 1014," is held to give the accused notice of that essential element.

This Court has never countenanced anything like the idea of satisfying the Fifth and Sixth Amendments—*e.g.* as stated in *Russell,* " 'contain[ing] the elements of the offense intended to be charged, "and sufficiently appris[ing] the defendant of what he must be prepared to meet" ' "—by such a recital.

This Court's historic standards are rather more demanding: *United States v. Cruikshank*, 92 U.S. 542, 558 (1876), declaring that an indictment " 'must state the species; it must descend to particulars' " in order "to inform the court of the facts alleged, so that it may decide

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[5] "The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein [*sic;* not "thereby"] to have violated." F. R. Cr.P. 7(c)(1). *See Russell v. United States,* 369 U.S. 749, 761-63 (1962).

whether they are sufficient in law to support a conviction, if one should be had." *Ex Parte Bain,* 121 U.S. 1, 10 (1887) disdaining the notion that "it lies within the province of a court to change the charging part of an indictent to suit its own notions of what it ought to have been."

Stirone v. United States, 361 U.S. 212, 218 (1960): "The very purpose of the (Fifth Amendment) requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Russell v. United States,* 369 U.S. 749, 763-64 (1962), summarizing Fifth and Sixth Amendment standards: "first, whether the indictment 'contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet,"' '. . . .'" Again to that effect, *Hamling v. United States,* 418 U.S. 87, 118 (1974).

The decision below, and the line of Eleventh Circuit doctrine of which this decision is the perfect exemplar, represent a grave intrusion upon these principles:

1. *Conflict by discarding Fifth Amendment standards that an indictment must "contain the elements":*

If a phrase such as "in violation of Title 18, United States Code, Section 1014" is thought to "contain the elents of the offense" or some essential element the Grand Jury omitted, the indictment is made to "contain" the distant element only in some constructive sense, by incorporation from the statute. *Russell* and other decisions of this Court explicating the Fifth Amendment therefore

do not bear utterance in such a discussion. The opinion below makes no mention of Fifth Amendment standards for "contain[ing] the elements of the offense," and apparently treats Sixth Amendment considerations as exclusive,[6] saying the closure phrase made the indictment "sufficiently definite and clear, certainly providing Greene with 'adequate notice of the charges against him' " (Footnote 4, A6).

2. Conflict by corrupting Fifth and Sixth Amendment standards for giving "notice" of the charge:

If the closure phrase in this indictment had in fact been adequate to notify Greene that "a loan underl[ying] the judgment" was "an essential element of the case," Opinion Footnote 4, A6, that notice should have been adequate to reach the trial judge as well. Certainly that notice should have reached the trial jury that convicted Greene. But the trial judge missed that supposed notice, consequently he charged the jury that a bare "judgment" is a sufficient § 1014 purview transaction (R18-257-204); and further, as quoted by the Court of Appeals, that "ne-

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[6] *United States v. Outler*, 659 F.2d 1306, 1310, 1311 (5th Cir. 1981) (Unit B), *cert. denied*, 455 U.S. 950 (1982), was a decision by the Eleventh Circuit in its predecessor's name during the transition. *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *Outler* quashed an indictment that did not negate an exception deemed "necessary to a true definition of the offense." Parsing *Russell's* summary of Fifth and Sixth Amendment principles, *Outler* noted "that if the Sixth Amendment requirements were the sole basis for this rule, then appellant would not succeed on appeal," for he "was fully aware of the charges against him several weeks before trial." Among other indicia of this, "the jury instructions included this element and charged the prosecution with the burden of proof." 659 F.2d at 1308.

gotiations to settle a judgment" are such a transaction. 862 F.2d at 1513, A3. The "adequate notice" perceived by the Court of Appeals in the closure phrase of this indictment registered only in the mind of the Court of Appeals.

For a related reason, Greene's case is the ideal vehicle for this Court's review of the Eleventh Circuit's closure phrase doctrine in light of the Fifth and Sixth Amendments. Of at least one Eleventh Circuit decision in this lineage it might be said that the "notice" given by the indictment was unambiguous, because the element missing from the indictment was singularly conspicuous in the statute. Indeed that *was* said in defense of *Stefan, infra,* p. 16, by three judges dissenting from the Fourth Circuit's en banc disapproval, categorically, of the Eleventh Circuit doctrine. *United States v. Hooker,* 841 F.2d 1225, 1234-35 (4th Cir. 1988) (dissenting op.), discussed *infra* p. 18.

By contrast, the missing element supposedly invoked from § 1014 by the closure phrase in Greene's indictment —the essential "loan [which] underlies the judgment," Footnote 4, 862 F.2d at 1515, A6—is a needle in the haystack described by § 1014 as:

> . . . any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefore . . . .

Thus if the idea of incorporating or noticing essential elements by section number reference can be said to

perform any Fifth or Sixth Amendment function in an indictment, the Eleventh Circuit's doctrine must yet be reconciled with the principle of *Cruikshank* and *Russell*, 369 U.S. at 765, that even a *recital* of general statutory language in an indictment must "descend to particulars." Greene's case graphically illustrates this inherent deficiency in Eleventh Circuit doctrine.

3. Conflict with Russell's standard of continuity in the indictment, the conviction and the appeal.

Russell, supra, aptly describes the prejudice to an accused in a "cryptic form of indictment." "It enables his conviction to rest on one point and the affirmance of the conviction to rest on another." 369 U.S. at 766 (1962). Comparing the jury instructions on which Greene was convicted—entirely faithful to the incomplete indictment—with Footnote 4 of the Court of Appeals affirmance, *Russell* could not have better predicted the prejudice to Greene in this "cryptic form of indictment." To put the matter another way, as this Court did on another occasion, if one accepts as true the Court of Appeals account of the charge against Greene, and of his conviction, then: "If so, he was convicted on a charge the grand jury never made against him. This was fatal error." *Stirone v. United States, supra*, 361 U.S. 212, 219 (1960).

4. These conflicts are not a single-case aberration but are systematic Eleventh Circuit doctrine.

The Court of Appeals decision is the full flower of doctrine that is now well rooted in the Eleventh and Fifth Circuits. *Greene* is unique only in its graphic illustration of the impact of closure phrase doctrine on Fifth

and Sixth Amendment values previously honored by this Court.

United States v. Stefan, 784 F.2d 1093, 1101-02 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986), which *Greene's* Footnote 4 cites to exemplify the doctrine, used it to more modest ends. *Stefan* indeed acknowledged that "to pass constitutional muster, an indictment must contain every element of the offense charged." The Court sustained a § 1001 indictment that did not charge Stefan "willfully" made the false statement, though he "knowingly" did so. Closure language specifically referring to § 1001 put Stefan on full notice; but "the analytical distinction" was "so slight" that Stefan would not be heard to complain "even if Count XIV failed to refer to the statute." *Id.* at 1102.

Stefan's antecedent was another case of modest impact. *United States v. Chilcote*, 724 F.2d 1498, 1504 (11th Cir.), *cert. denied* 467 U.S. 1218 (1984) sustained an indictment charging that defendant "use[d] a firearm . . . *during* the commission of a felony," whereas the statute proscribed "us[ing] a firearm *to commit* any felony" (emphasis by the Court). Held: "[W]hen the indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice. *See United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981). . . ." *Id.*, 724 F.2d at 1505:

> The language of Count V provides notice of every element of the crime charged. Any slight variation between the language of the indictment and the statute itself is cured by the indictment's reference to the statute.

Varkonyi leaned more heavily than did *Chilcote* and *Stefan* upon its closure phrase. That indictment under § 111 did not charge that the person allegedly interfered with "while engaged in . . . his official duties," namely, "Louis E. Barragan," was in fact a Border Patrol agent or any other of the designated officials. Held: "The citation of this statute . . . served the dual purpose of affirmatively showing federal jurisdiction," 645 F.2d at 456,

> as well as directing the reader to 18 U.S.C. § 1114, wherein, the reader would find a listing of the particular federal officers protected by the statute.

Thus "a plain reading of the indictment would have informed the defendant that he had been charged with assault and interference against a man, *recognized by him on the day of the incident as a Border Patrol agent,* who was engaged in the performance of his official duties, in violation of 18 U.S.C. § 111." *Varkonyi*, 645 F.2d at 456 (emph. added to this reference to evidence).

The *Greene - Stefan - Chilcote - Varkonyi* root then recedes into more conventional analysis. *See Varkonyi's* claimed precursor, *United States v. Mullens*, 583 F.2d 134 (5th Cir. 1978).

The decision presented for review is the product of doctrine systematically developed in two circuits over several years. Its conflict with historic decisions of this Court is direct, clear and mature. The conflict requires reconciliation by this Court, lest aberrant doctrine take its predictable toll on many future criminal appeals in the Eleventh Circuit.

B. Conflict among the courts of appeal on the effect of closure phrases in Fifth and Sixth Amendment functions is direct, apparent, and mature for consideration.

On the one hand the Court of Appeals for the Eleventh Circuit, with some support in the Fifth,[7] employs indictment closure phrases to incorporate or give the accused "notice" of essential elements described only in the statute and not in the indictment. On the other hand, the Second, Fourth, Seventh and Eighth Circuits hold that such recitals have no constitutional efficacy.

The Fourth Circuit expressly disapproves the Eleventh's *Stefan* doctrine. *United States v. Hooker*, 841 F.2d 1225 (4th Cir. 1988), following *Russell* at 1227, held en banc that the indictment was fatally defective "for failure to include one element of the substantive offense, namely, that the business enterprise had an effect on interstate commerce." *Id.* at 1226. *Hooker* took note of the mitigating factor in *Stefan*, "the major part of the *mens rea* element was present," but went on to say, 841 F.2d at 1229:

> In the case at bar, by contrast, an element is missing in its entirety. But, to the extent that *Stefan* may be said to rely on a mere statutory reference in the indictment to supply an essential element of the offense charged, it is contrary to implicit precedent in this

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[7] The Fifth Circuit too, from which the Eleventh was created, rendered decisions to which the *Chilcote-Stefan-Greene* doctrine is traceable. *United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981); *United States v. Arteaga-Limones*, 529 F.2d 1183, 1199-1200 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). *See also United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981). *But see United States v. Meacham*, 626 F.2d 503, 507 (5th Cir. 1980).

> circuit, as well as stated law in a substantial majority of the Circuits which have considered the issue and we explicitly reject the ruling to that effect in *Stefan.*

United States v. Pupo, 841 F.2d 1235, 1239 (4th Cir.), *cert. denied,* — U.S. — (1988) [1988 U.S.L.W. 104716], released simultaneously with *Hooker,* also stood by the historic standards:

> We hold that a mere citation to the applicable statute does not give the defendant notice of the nature of the offense. An indictment that must rely on a statutory citation does not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *See Hamling v. United States,* [citation omitted].

Pupo therefore declared, "We refuse to follow" the former Fifth Circuit decision, *United States v. Arteaga-Limones,* 529 F.2d 1183, 1199-1200 (5th Cir.), *cert. denied,* 429 U.S. 920 (1976), *supra* fn. 7, "in which the court held that scienter was adequately charged if the indictment also cited the statute itself." *Pupo,* 841 F.2d at 1239.

The Second Circuit likewise disassociated itself from this doctrine. *United States v. Berlin,* 472 F.2d 1002, 1008 (2d Cir.), *cert. denied,* 412 U.S. 949 (1973) quashed an indictment notwithstanding that referenced statutes "explicitly require knowledge of the falsity," the missing element: "[I]f this were enough to cure a deficient statement, then almost no indictment would be vulnerable to attack . . . ."

So also the Seventh. *United States v. Wabaunsee,* 528 F.2d 1, 4 (7th Cir. 1975), where the indictment failed to allege the essential element of guilty knowledge:

> If the mere citation to the statute were enough, the Supreme Court's statement in *Russell v. United States, supra*, that an indictment must contain all the elements of the offense charged, would be vitiated. Until the Supreme Court addresses the question of whether mere citation to the statute is adequate, we prefer to adhere to the rule of this circuit set forth in *Calhoun*.

And the Eighth. *United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988), vacating a conviction and dismissing an indictment that failed to characterize Zangger's alleged masturbation on film as "obscene"—the essential statutory element: "If an essential element of the charge has been omitted from the indictment, the omission is not cured by the bare citation of the charging statute." [Omitting the court's citations to *Pupo, Hooker* and a prior 8th Circuit decision.]"

This irreconcilable conflict among the several circuits is in need of resolution by this Court.

C. Question III: Conflict with corollary Due Process rights to trial on charges by the Grand Jury's indictment and on no other charge.

The Court of Appeals affirmed Greene's conviction on Count Four despite his appeal that the trial judge explicitly authorized the jury to convict him for an offense not charged. The opinion acknowledges: "For an unexplained reason Greene was not charged with a section 1014 offense against Peoples Bank." 862 F.2d at 1516 fn. 7, A9. The evidence was strong concerning that (uncharged) offense but "somewhat equivocal" as to the charged offense against Marine Midland Bank. 862 F.2d at 1516, A10. As the opinion indicates, Greene's credit application state-

ment to Peoples Bank was taken by Erber to Marine Midland Bank, 862 F.2d at 1516, A11, after "Peoples Bank wisely rejected Greene's application." At 1515, A7.

The Grand Jury in Count Four (A17) alleged only an offense against Marine Midland. Yet the trial court charged the jury over objection (R18-257-22/25) that it wasn't necessary for a conviction that "the defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank" (R18-257-205).

This principle concerns other issues entirely.[8] But the charge squarely placed Greene in jeopardy of conviction for an offense not charged, against Peoples Bank.

His Fifth Amendment right to trial on an indictment sufficiently specific to protect against former jeopardy is of benefit to Greene only if its charges are rigorously adhered to at trial; else he may yet be indicted again, for the Peoples Bank offense, despite having been convicted for that offense in fact. *Russell,* 369 U.S. at 766. It is of no protection that the accused goes to trial with the chief issue defined by such an indictment, only to have the indictment amended by the court's charge to the jury.

Stirone concluded, "The right to have the grand jury make the charge on its own judgment is a substantial right

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[8] The accused need not have known the target bank was FDIC-insured, e.g., *United States v. Sabatino,* 485 F.2d 540, 544 (2d Cir. 1973), *cert. denied,* 415 U.S. 948 (1974), *United States v Bowman,* 783 F.2d 1192, 1197-98 (5th Cir. 1986); and need not have known the identity of several banks to whom he authorized several false statements not addressed to any particular bank, e.g., *United States v. Lentz,* 524 F.2d 69 (5th Cir. 1975), *United States v. Miranne,* 688 F.2d 980 (5th Cir. 1982), *cert. denied,* 459 U.S. 1109.

which cannot be taken away with or without court amendment," after describing the particular circumstances in which that trial court similarly expanded the charge of the indictment by unwarranted instructions to the jury. 361 U.S. at 218:

> It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

The right infringed is indeed so elemental that it is assured against infringement by the states, through the Due Process Clause of the Fifth and Fourteenth Amendments. *Gregory v. Chicago*, 394 U.S. 111 (1969); *Gardner v. Louisiana*, 368 U.S. 157, 164 (1961).

CONCLUSION

Petitioner Greene in each of the Questions Presented invokes principled decisions of this Court defending the integrity of the Grand Jury indictment.

In all respects the case is worthy of consideration on the merits.

Respectfully submitted,

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April 21, 1989

APPENDIX

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS H. GREENE,

Defendant-Appellant.

No. 88-3106.

United States Court of Appeals,
Eleventh Circuit.
Jan. 12, 1989.

Before HILL and JOHNSON, Circuit Judges, and NICHOLS,* Senior Circuit Judge.

JOHNSON, Circuit Judge:

Thomas Greene appeals his conviction after a jury trial on four counts of making false statements to influence a federally insured bank in violation of 18 U.S.C.A. § 1014. We affirm.

I. FACTS

Greene was convicted on three counts of violating 18 U.S.C.A. § 1014 by misrepresenting his net worth and ability to pay to a Florida bank in order to obtain the favorable settlement of a judgment debt which stemmed from a defaulted loan. Greene was also convicted on a fourth count of making false statements on a loan application to

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* Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

a New York bank in violation of 18 U.S.C.A. § 1014.[1] Greene failed on a motion to have Counts 1-3 dismissed as not within the scope of section 1014. After a prolonged jury trial, he was convicted on all four counts and was sentenced to three concurrent terms of two years on Counts 1-3, and one term of two years on Count 4 to be served consecutively with the sentences imposed for Counts 1-3.

II. DISCUSSION

A. *Counts 1-3: The Scope of Section 1014*

Greene was indicted under 18 U.S.C.A. § 1014, which states:

> **Loan and credit applications generally; renewals and discounts; crop insurance**
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any *application,* advance, discount, purchase, purchase agreement, repurchase agreement, commitment, *or loan,* or any change or extension of any of the same, by renewal, acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

(emphasis added) The indictment charged that Greene "knowingly and willfully did make materially false statements in connection with a request and application to settle

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1. Green does not dispute the facts underlying his convictions (except for the fact of criminal intent as to Count 4).

an outstanding judgment of $123,413.58 obtained by Flagship Bank." The judge charged the jury that "[f]alse statements to a federally insured bank during negotiations to settle a judgment can constitute a crime under 18 U.S.C. Section 1014." The issue on appeal is whether section 1014 covers Greene's conduct.

Nearly every case construing section 1014 involves misstatements made in applications to obtain loans. *See, e.g., United States v. Wuagneux,* 683 F.2d 1343, 1360 (11th Cir.1982), *cert. denied,* 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed. 2d 83 (1983). The false statements made by Greene occurred well after the loan was applied for, issued, and defaulted. He did not lie to the bank until settlement negotiations had begun on the judgment debt arising from the loan. Some guidance as to whether Greene's conduct came within the proper scope of section 1014 can be found in *Williams v. United States,* 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982), where the Court considered whether writing bad checks as part of a check-kiting scheme violated section 1014. The Court held such conduct was not within the scope of section 1014 because a bad check was not a "false statement" made to a bank. Significantly, the Court did not limit the reach of section 1014 to loan applications. It spoke in terms of "representations made in connection with conventional loan *or related transactions.*" *Id.* at 288-89, 102 S.Ct. at 3093-94 (emphasis added). The government in this case argues that Greene's request to settle his judgment debt was a "related transaction," or that his participation in the settlement nego-

tiations, including the misrepresentations of his net worth, constituted an "application."[2]

Greene claims that section 1014 by its terms does not reach so far. If Congress had wanted to prohibit all misstatements to banks, it could have done so.[3] Greene also relies on *Williams*, which explains that:

> To obtain a conviction under § 1014, the Government must establish two propositions: it must demonstrate (1) that the defendant made a "false statement or report," or "willfully overvalue[d] any land, property or security," and (2) that he did so "for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance, . . . commitment, or loan."

458 U.S. at 284, 102 S.Ct. at 3091. Greene reads this formulation of the elements of a section 1014 offense to preclude his conviction for any misrepresentations except those made on a loan application. Because section 1014 does not clearly prohibit his conduct, Greene argues, any interpretation which would encompass his conduct in effect establishes a new offense.

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2. Section 1014 is written in the disjunctive. It prohibits misstatements in an "application . . . *or* loan" (emphasis added), not merely an application *for* a loan.

3. Greene points to 18 U.S.C.A. § 1001 which was recodified at the same time as section 1014. Section 1001 clearly prohibits *all* intentional misstatements to federal agencies. Section 1014 is narrower, and Greene claims that that difference in drafting indicates that section 1014 is not the catchall statute the government wants it to be. The government agrees that section 1014 is narrower and probably does not reach *all* misstatements made to a bank. However, it argues that when the judgment debt arises from a defaulted loan, misstatements made in settlement negotiation are related transactions.

Greene finds support in the familiar principle that "[t]here are no constructive offenses; and before one can be punished it must be shown that his case is plainly within the statute." *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292 (1987) (mail fraud statute does not prohibit schemes to defraud people of right to impartial government) (*quoting Fasulo v. United States*, 272 U.S. 620, 47 S.Ct. 200, 71 L.Ed. 443 (1926)). Greene is absolutely correct in stating that a court may not rely wholly on the spirit, rather than the language, of a criminal statute to uphold a conviction. *See United States v. Resnick*, 299 U.S. 207, 57 S.Ct. 126, 81 L.Ed. 127 (1936) (statute prohibiting deviation from exact bushel standard in numerous sizes of hampers not violated when defendant deviated by using a size hamper not expressly listed). Greene relies heavily on *Resnick*. In *Resnick*, the spirit of the Standard Container Act was violated, but its express provisions were not. Greene's fraud easily falls within the spirit of section 1014, but, he claims, his misconduct is not expressly prohibited by the statute.

In denying Greene's motion to dismiss the indictment, the district court held that because intentional misstatements made in applying for a loan are prohibited by section 1014, it would be illogical to find that intentional misstatements made in the course of settling a defaulted loan reduced to judgment would not be covered. The court concluded that the settlement negotiations must be "related transactions" under *Williams*. The case law supports this conclusion. In *United States v. Gardner*, 681 F.2d 733 (11th Cir.1982) (per curiam), this Court held

that section 1014 may be violated even when the false statements are made *after* the loan has issued. The defendant in *Gardner* took out a loan. When he defaulted on the loan, the bank filed suit. At that point, he induced the bank "to defer the civil action by assigning to the bank his interest in accounts receivable based on fictitious invoices." *Id.* at 733. The Court found these misrepresentations to be within the scope of section 1014. Although the bank in *Gardner* had not yet reduced the defaulted loan to judgment, the case is quite similar to the one presently before the Court. There is no logical basis for a distinction between making misstatements to a bank to delay litigation and making misstatements to obtain a favorable settlement after judgment.[4] *See United States v. Baity*, 489 F.2d 256, 257 (5th Cir.1973) (false documents submitted after loan approval fell within section 1014); *accord United States v. Kindig*, 854 F.2d 703, 706 (5th Cir.1988).

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4. This reasoning makes the nature of the debt underlying the judgment an essential element of the case. For example, if Greene had hit the bank with his truck, lost a damage suit, and then lied to get a better settlement, section 1014 would not be implicated. Lying to a bank during settlement negotiations on a judgment debt is only a federal crime when a loan underlies the judgment.

Greene argues that the indictment is fatally defective for alleging only a judgment debt and failing to allege a "judgment debt arising from a defaulted loan." We find the indictment sufficiently definite and clear, certainly providing Greene with "adequate notice of the charges against him." *United States v. Stefan*, 784 F.2d 1093, 1102 (11th Cir.1986) (indictment found adequate in spite of failure to specifically allege essential element of willfulness in prosecution under 18 U.S.C.A. § 1001).

Section 1014 prohibits fraud perpetrated in credit transactions with federally insured banks. Greene's settlement negotiations arose from loan transactions with a federally insured bank and were therefore part of a credit transaction within the purview of section 1014. Consequently, we affirm the district court's denial of Greene's motion to dismiss and affirm his conviction on the first three counts of the indictment.

B. *Count 4: Venue*

Count 4 was also brought under 18 U.S.C.A. § 1014, but alleged a different transaction. Greene wanted to invest in a tax shelter being set up by a certain Mr. Erber. Greene, however, lacked sufficient funds to participate. In order to raise those funds, Greene submitted a fraudulent loan application to Erber's bank in New York, Peoples Bank. Peoples Bank wisely rejected Greene's application, and Erber took the application to another New York bank, Marine Midland, which accepted it.

Greene argues that venue was improper in the Middle District of Florida. Venue is proper in section 1014 cases "in the district where the false statement is prepared and mailed, or where the statement is received." *Wuagneux*, 683 F.2d at 1356. Greene admits venue would be proper in New York, where Erber received the false statement. Greene argues that venue was improper in Florida because, although he prepared the loan application in the Middle District of Florida, he never mailed the loan application to Marine Midland.[5] This Court in *Wuagneux*

5. Erber transmitted it by hand from Peoples Bank to Marine Midland.

sidestepped the issue of whether mailing was a necessary prerequisite to proper venue in a district where fraudulent documents were prepared. *Id.* at 1357 (avoiding question of whether "preparation and execution alone would be insufficient" by finding sufficient evidence of mailing). In the present case, we must confront the mailing issue directly, because it is undisputed that Greene did not mail the application to Marine Midland Bank.

The reasoning of the Court in *Wuagneux* indicates that venue is proper in Florida even if Greene did not mail the application directly to Marine Midland. The Court held that section 1014 cases should be governed by the same "general rule of venue" as cases brought under 18 U.S.C.A. § 1001.[6] This Court recently held that section 1001 cases are governed by the general venue statute, 18 U.S.C.A. § 3237(a). *United States v. Hernando-Ospina*, 798 F.2d 1570, 1577 (11th Cir.1986). That statute provides that "[e]xcept as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another . . . [may be] prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C.A. § 3237(a).

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6. 18 U.S.C A. § 1001 provides in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up any trick, scheme, or device a material fact, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The evidence showed that Greene's offense was begun in the Middle District of Florida, where he completed the false application and where he communicated with Erber. Section 1014 does not require the use of the mails, as do many federal criminal statutes. Greene's conduct in Florida clearly establishes venue there under 18 U.S.C.A. § 3237(a). A Jacksonville resident who prepares fraudulent documents in Jacksonville and who signs a promissory note with disbursement instructions in Jacksonville cannot escape prosecution in Jacksonville simply because one of his minions has performed the actual transmittal of the documents within New York. Consequently, we hold that venue was proper in the Middle District of Florida.

C. *Count 4: Sufficiency of Evidence*

Greene claims that the government failed to prove that he willfully and with knowledge submitted a fraudulent loan application to Marine Midland Bank. In reviewing Greene's claim, "we must view all the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and all reasonable inferences from the evidence must be drawn in favor of the jury's verdict." *Hernando-Ospina,* 798 F.2d at 1577-78. He argues that the proof showed that he submitted an application to Peoples Bank.[7] Erber submitted Greene's application to Marine

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7. For an unexplained reason Greene was not charged with a section 1014 offense against Peoples Bank.

Midland. Greene argues that there was no evidence that he directed Erber to make the second application.

The jury had before it Erber's testimony, which was somewhat equivocal but was sufficient to establish Greene's intent to defraud Marine Midland. The testimony of Erber was as follows:

> BY MR. FALLGATTER:
>
> Q. Did you have discussion with Mr. Tommy Greene, notifying him that the Marine Midland Bank would be processing the loan application that had originally gone to the Peoples National Bank?
>
> A. I don't remember correctly if it was Tommy or Mr. Ray Greene, but one of them was notified.
>
> Q. Do you recall testifying in the grand jury about that particular question?
>
> A. No.
>
> Q. Let me show you Page 39 of your grand jury testimony. (Mr. Fallgatter tendering document to the witness.) At Lines 7 through 17 or 20.
>
> A. (Witness perusing document.) That is regarding Marine Midland.
>
> Q. Yes, sir.
>
> A. Yes.
>
> Q. And at Line 12, you were asked: "Did you have any direct discussions with Mr. Greene about Marine Midland Bank?"

Answer: "I'm sure I had some discussion with him, notifying him that would be the bank that was going to discount the notes."

It that true testimony?

A. Yes, but—

. . .

Q. Is that accurate testimony, sir?

A. I am, I might have missed something. What was the question before regarding the transfer to Marine —to M & T Bank, not Marine.

Q. I'm sorry, no, I'm asking about conversations that you had with Mr. Tommy Greene—

A. Regarding—

Q. —reporting to him that the application that had originally been taken to Peoples was being sent over to Marine Midland.

A. Yes, okay.

Q. And did you have such discussions with him?

A. I'm sure, as as I said here in the testimony. I'm sorry, I was thinking about from Marine to M & T.

Q. All right. For the record, when you were asked that question in the grand jury, were you talking about Tommy Greene or C. Ray Greene? And if you need to look back at Page 38, Line 8, the immediately preceding page.

A. (Witness perusing document.) Again, as I said before, I am sure there was some conversation with

> Mr. Tommy Greene, but most of my conversations were with Ray Greene.
>
> Q. Right. But just for the record, now, when you were answering—
>
> A. I said to the grand jury, I said there were some conversations, some discussion. I assume there were some discussions with Tom Greene.

The jury also had before it the fact that Erber reported the approval of the application to Greene and that Greene signed a promissory note and wrote a letter to Marine Midland directing disbursement of the funds. The jury is the arbiter of the credibility of witnesses. *Novatel Comm., Inc. v. Cellular Tele. Supply, Inc.*, 856 F.2d 151, 157 (11th Cir.1988). We hold that the jury could have reasonably found that Greene knowingly and willfully ratified Erber's submission of the application.

We find that sufficient evidence was before the jury to support Greene's conviction. In *United States v. Lentz*, 524 F.2d 69, 71 (5th Cir.1975), we held:

> In our view, it is sufficient to establish that the false statement was made for the purpose of influencing the action of a covered institution, if the proof shows that the defendant received notice sufficient to create a reasonable expectation that the statement would reach an institution of the type included in the statute. The proof need not show that it was presented directly to a covered institution.

In *Lentz*, the defendant executed false sales contracts which he knew would be discounted through a dealer who would present them to "a bank." This Court held that the de-

fendant need not have directly presented the false contracts to the bank, nor did he need to possess actual knowledge that the bank was insured by the FDIC. Greene argues that the defendant in *Lentz* meant to defraud any available bank, while Greene meant to defraud only Peoples Bank. Greene claims Erber acted on his own in transmitting the application to Midland Marine Bank. The jury could have found from the evidence before it that Greene intended to defraud Marine Midland in addition to Peoples Bank. *See Hernando-Ospina*, 798 F.2d at 1578.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the convictions on all four counts.

ORDER
ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(filed February 22, 1989)

Before HILL, and JOHNSON, Circuit Judges, and NICHOLS, Senior Circuit Judge.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

THE INDICTMENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	Case No. 8/-32(S)-Cr-J-12
v.	Cts. 1, 2, 3, 4
THOMAS H. GREENE	18 U.S.C. § 1014

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about April 12, 1984, at Jacksonville, in the Middle District of Florida, the defendant,

THOMAS H. GREENE

knowingly and willfully did make materially false statements in connection with a request and application to settle an outstanding judgment of $123,413.58, obtained by Flagship Bank of Jacksonville against him, with intent to and for the purpose of influencing the action of the Sun Bank/North Florida, N.A. (formerly Flagship Bank of Jacksonville), Jacksonville, Florida, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in that THOMAS H. GREENE stated in substance to Raymond O. Miller, Senior Vice President of said bank, that (1) he had no net worth and (2) was unable to pay the entire amount of the judgment, whereas in truth and in fact, as THOMAS H. GREENE then well knew, those statements were false in that he (1) did have a substantial net worth and (2) he was able to pay the entire amount

of the judgment; in violation of Title 18, United States Code, Section 1014.

COUNT TWO

On or about May 9, 1984, at Jacksonville, in the Middle District of Florida, the defendant,

THOMAS H. GREENE

knowingly and willfully did make materially false statements in connection with a request and application to settle an outstanding judgment of $123,413.58, obtained by Flagship Bank of Jacksonville against him, with intent to and for the purpose of influencing the action of the Sun Bank/North Florida, N.A. (formerly Flagship Bank of Jacksonville), Jacksonville, Florida, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in that THOMAS H. GREENE, in a letter dated May 9, 1984 from himself to Raymond O. Miller, Senior Vice President of said bank, stated that (1) he had a nominal or negative net worth and that, (2) because of certain substantial contingent tax liabilities relative to partnerships that he was involved in during the 1970's, and due to the fact that some of those partnerships still existed, (3) his Certified Public Accountant, James E. Bullard, had advised him against preparing net worth statements showing itemized and specific contingencies, whereas in truth and in fact, as THOMAS H. GREENE then well knew, those statements were false in that (1) he did have a substantial net worth, (2) did not have substantial contingent tax liabilities relative to partnerships

that he was involved in during the 1970's, and (3) his Certified Public Accoutant, James E. Bullard, had not advised him against preparing a net worth statement showing itemized and specific contingencies; in violation of Title 18, United States Code, Section 1014.

COUNT THREE

On or about June 12, 1984, at Jacksonville, in the Middle District of Florida, the defendant,

THOMAS H. GREENE

knowingly and wilfully did make materially false statements in connection with a request and application to settle an outstanding judgment of $123,413.58, obtained by Flagship Bank of Jacksonville against him, with intent to and for the purpose of influencing the action of the Sun Bank/North Florida, N.A. (formerly Flagship Bank of Jacksonville), Jacksonville, Florida, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in that THOMAS H. GREENE stated in substance to Raymond O. Miller, Senior Vice President of said bank, that (1) he could not afford monthly settlement payments of more than 60 level monthly payments [$533.33 per month] and that (2) he would speed up the payments if possible; whereas in truth and in fact, as THOMAS H. GREENE then well knew, those statements were false in that (1) he could afford more than $533.33 per month and (2) he did not intend to speed up the payments even if possible; in violation of Title 18, United States Code, Section 1014.

COUNT FOUR

From on or about May 2, 1984, through on or about July 12, 1984, at Jacksonville, in the Middle District of Florida and elsewhere, the defendant,

THOMAS H. GREENE

knowingly and willfully did make and cause to be made materially false statements in connection with an application for a $170,000 loan to purchase a limited partnership interest in Urban Waste Disposal Associates, with intent to and for the purpose of influencing the action of the Marine Midland Bank, N.A., 140 Broadway, New York, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in that THOMAS H. GREENE submitted and caused to be submitted to the said bank a credit application, dated May 2, 1984, which stated in substance that (1) he had no unsatisfied judgments against him within the last seven years and that (2) his only debt was a $137,000 debt to Security First Federal Savings and Loan, Daytona Beach, Florida, whereas in truth and in fact, as THOMAS H. GREENE then well knew, (1) he did have unsatisfied judgments against him within the last seven years of said application and (2) did have debts other than the $137,000 debt he reported; in violation of Title 18, United States Code, Sections 1014 and 2.

OPINION OF THE DISTRICT COURT
DENYING MOTION TO DISMISS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No. 87-32(S)-Cr-J-12

THOMAS H. GREENE

ORDER

(Filed July 14, 1987)

In an indictment filed on February 19, 1987, defendant was charged with three counts of knowingly and willfully making false statements to a federally insured bank in connection with a request to settle an outstanding judgment, all in violation of 18 U.S.C. § 1014 (Counts One, Two and Three), one count of knowingly and willfully devising a scheme and artifice to defraud a federally insured bank, in violation of 18 U.S.C. § 1344 (Count Four), and one count of knowingly and willfully making false statements to a federally insured bank in connection with an application for a loan, in violation of 18 U.S.C. §§ 1014 and 2 (Count Five). Then, on April 23, 1987, the government filed a superseding indictment in which it charged defendant with the same offenses set forth in the original indictment.

Defendant filed a motion to dismiss with regard to the original indictment on April 23, 1987, to which the government filed a response in opposition on April 30,

1987. After the government submitted the superseding indictment, defendant, on May 19, 1987, filed a motion to dismiss said indictment, in which he included by incorporation the points raised in his first motion to dismiss. Thereafter, on May 27, 1987, the government filed a memorandum of law opposing defendant's motion to dismiss the superseding indictment. In its memorandum, the government also incorporated by reference the arguments set forth in its initial opposition.

A hearing was held on the matter on May 28, 1987, at which time the Court heard argument by counsel for the respective parties. Upon consideration of the memoranda submitted by counsel with regard to the original indictment and the superseding indictment, as well as the arguments presented by counsel at the aforementioned hearing, and upon review of the law pertinent hereto, the Court is of the opinion that defendant's motion to dismiss the superceding indictment should be denied. The basis of the Court's decision follows.

Counts One, Two, and Three (Alleged Violations of 18 U.S.C. § 1014)

Defendant argues that making statements during negotiation sessions to settle a judgment owned by a bank which is insured by the Federal Deposit Insurance Corporation is not prohibited conduct within the scope of 18 U.S.C. § 1014. This section provides in pertinent part:

> Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, pur-

> chase, purchase agreement, repurchase agreement, commitment, or loan, or any exchange or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Specifically, defendant contends that the crime for which he is charged in the initial three counts of the indictment, making false statements in connection with an attempt to settle an outstanding judgment, is not one of the activities enumerated in § 1014. According to arguments presented by defendant's counsel, § 1014 was intended by Congress to reach false statements made in relation to credit transactions, not activities such as negotiations concerning the settlement of a judgment.

Defendant relies on numerous cases as support for his motion to dismiss Counts One, Two, and Three. Two cases, however, form the foundation of defendant's attack: *Williams v. United States*, 458 U.S. 279 (1982) and *United States v. Krown*, 675 F.2d 46 (2d Cir. 1982). It is defendant's position that these cases limit the reach of 18 U.S.C. § 1014 to statements made in relation to an application or commitment involving a credit transaction, therefore excluding the activity of negotiating to settle a judgment. A brief discussion of these cases is in order.

In *Williams v. United States*, 258 U.S. at 279, the Supreme Court had before it a very narrow issue: "Whether the deposit of a 'bad check' in a federally insured bank is proscribed by 18 U.S.C. § 1014." The Court stated that in order to be convicted under § 1014, the government had

to prove that the defendant (1) made a "false statement or report," or "willfully overvalue[d] any land, property, or security," and (2) that he made such statement or report "for the purpose of influencing in any way the action of [the bank or banks] upon application, advance, . . . commitment, or loan." The Court found that the writing of bad checks is not "a false statement." Therefore, the government had failed to meet its burden. The Court's decision in *Williams* does not address whether the scope of the statute extends only to credit transactions expressly stated. The limitation placed on the statute by the Court in *Williams* involved the question of what constitutes a false statement under § 1014. The only restriction placed on the statute is the requirement that "a factual assertion" must be made in conjunction with a transaction for there to exist a false statement. *Id.* at 284.

In the case at bar, Counts One, Two, and Three of the indictment clearly allege that defendant made oral and written false statements with regard to his financial condition. Therefore the *Williams* holding does not place the alleged activities of defendant outside the bounds of § 1014.

Like the Supreme Court in *Williams*, the Second Circuit Court of Appeals in *United States v. Krown*, 675 F.2d at 46 had before it the issue of whether a fraudulent check is a false statement under the meaning of § 1014.[1] The

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[1] The Court notes that while *Williams* involved a check kiting scheme and *Krown* involved an attempt to have fraudulent certified checks placed in an account, the question of whether a check is a statement was presented in both cases.

Second Circuit decided that it is not. The court in *Krown* also found that while the defendant had deposited three fraudulent checks, there had been no action taken by the bank in reliance on the checks. In fact, "[defendant] received no funds from the bank . . . either in the form of a conventional advance or loan or by way of a withdrawal from her account." Finally, it was the court's view that there was no evidence that defendant attempted to influence the bank in connection with an advance or loan.

In contrast to *Krown*, the indictment in the present case (1) charges defendant with making both oral and written false statements; (2) reflects that the bank took action based on the alleged false statements of defendant in that it agreed to settle the judgment it had against him; and (3) quite clearly, states that defendant made the alleged false statements to influence the bank. Thus, the Court does not find the holding in *Krown* to be dispositive of the issues presented herein.

The Fifth Circuit Court of Appeals, in *United States v. Bush*, 599 F.2d 72, 75 (5th Cir. 1979), had occasion to discuss the breadth of § 1014 and made the following observation:

> While it is undoubtedly true that 18 U.S.C. § 1014 benefits various financial institutions, the law's ultimate beneficiary is the United States. False statements given to insured banks have the potential to mislead the auditors charged with maintaining the federal standards. The government's interest in maintaining the vitality of its insurance programs mandates that all material false statements violate § 1014, even when the false statements are given with the knowledge, consent or duplicity of a bank officer.

The *Bush* court's view is indicative of the broad interpretation Court's have given § 1014. Moreover, the Court finds that the Supreme Court's opinion in *Williams* supports this view. In *Williams*, the Court noted that § 1014 "provides penalties for making false statments or reports in connection with loans or other similar transactions."[2] *Williams*, 458 U.S. at 289-90. A false statement made in the context of a credit transaction and a false statement made during settlement negotiations have the same detrimental effect on a bank, and therefore on the federal government insurance programs. It does not follow that once a delinquent loan is reduced to a judgment § 1014 becomes inoperative. Logically then, a false statement made in settlement negotiations should be considered a "similar transaction" under the statute. Therefore, the Court finds that making false statements to a federally insured bank during negotiations to settle a judgment constitutes a cognizable offense under § 1014.

. . .

Count [Four] (Alleged Violation of 18 U.S.C. § 1014)*

Defendant argues that the language "from on or about May 2, 1984 through on or about July 12, 1984" ren-

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2 The dissent in *Williams* made clear that § 1014 is a "comprehensive statute designed to protect the assets of federally insured lending institutions." *Williams*, 458 U.S. at 293 (Marshall, J., dissenting).

* [This note by petitioner's counsel]: For consistency with the elided superseding indictment (one intervening count was dropped before trial), the numbering is changed to Count Four rather than Count Five as in the original Order.

ders the count duplicitous. Moreover, defendant asserts that by setting forth that false statements were made "from on or about May 2, 1984 through on or about July 12, 1984," the government has made the offense for which defendant is charged a continuous crime. According to defendant, the offense proscribed in § 1014 cannot be a continuing one. *See Bins v. United States*, 331 F.2d 390 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964).

The flaw of duplicity exists when more than a single crime is charged in one count of an indictment. In Count [Four] of the present indictment, the government has charged defendant with a violation of § 1014 in connection with a single credit application dated May 2, 1984. Therefore, the Court is of the opinion that Count [Four] does not suffer from duplicity and does not constitute a continuing offense.

Based on the foregoing and after full consideration of all points raised by defendant and the government, it is

ADJUDGED:

That defendant's motion to dismiss the superseding indictment is hereby denied.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 14th day of July 1987.

/s/ Howell W. Melton
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1710

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS H. GREENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13pp

QUESTIONS PRESENTED

1. Whether the indictment was sufficient to charge petitioner with making false statements to influence the action of a federally insured bank, in violation of 18 U.S.C. 1014.

2. Whether petitioner was convicted of a crime not charged in the indictment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 862 F.2d 1512. The opinion of the district court (Pet. App. A18-A24) is reported at 670 F. Supp. 337.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1989. A petition for rehearing was denied on February 22, 1989. Pet. App. A13. The petition for a writ of certiorari was filed on April 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was con-

victed on four counts of making a false statement to a federally insured bank, in violation of 18 U.S.C. 1014. He was sentenced to a total of four years' imprisonment and a $25,000 fine. The court of appeals affirmed. Pet. App. A1-A13; Gov't C.A. Br. 3.

1. The evidence at trial on Counts 1 through 3, which is not in dispute, showed that petitioner, an attorney, was indebted to the Flagship Bank of Jacksonville, Florida. By 1979, the bank had twice sued petitioner and had obtained two judgments against him, including one in the amount of $123,413.58. In 1984, the Sun Bank acquired Flagship. In reviewing Flagship's records, Sun Bank officers learned that petitioner had made no payments on his outstanding judgments. In April, May, and June 1984, petitioner contacted a bank officer to resolve the issue of the outstanding judgments. On each occasion, petitioner made misrepresentations with respect to his personal finances in an effort to avoid paying the $123,413.58 judgment. Gov't C.A. Br. 4-10.

The evidence concerning Count 4 showed that during May and July 1984, petitioner submitted a fraudulent application for a $170,000 loan to the Peoples National Bank in New York. See Gov't Exh. 49A, included in Pet. C.A. App. When the loan was not made, petitioner's agent, Leslie Erber, submitted the application to the Marine Midland Bank in New York. Erber told petitioner about the submission, and petitioner approved it. Based on that application, Marine Midland issued the loan. Pet. App. A7, A9-A13; Gov't C.A. Br. 42.

2. The bank false statement statute, 18 U.S.C. 1014, makes it an offense for any person knowingly to make a false statement for the purpose of influencing a federal bank "upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by

renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor." Counts 1 through 3 of the four-count indictment against petitioner involved petitioner's false statements to the Sun Bank. Each of those counts alleged that petitioner "knowingly and willfully did make materially false statements in connection with a request and application to settle an outstanding judgment of $123,413.58, obtained by Flagship Bank of Jacksonville against him" with the intent of influencing the action of the Sun Bank. Pet. App. A14-A16. Count 4 alleged that petitioner "knowingly and willfully did make and cause to be made materially false statements in connection with an application for a $170,000 loan" with the intent of influencing the action of the Marine Midland Bank. Pet. App. A17.

Prior to trial, petitioner moved to dismiss the first three counts of the indictment on the ground that they did not state an offense. He argued that Section 1014 did not reach false statements made in connection with negotiating sessions to settle a judgment owed to a bank. Petitioner conceded that the judgment at issue was based on a loan from the bank (Def's Mem. in Support of Def's Mot. to Dismiss Indictment 5; Def's Mem. in Support of Def's Mot. to Dismiss Superseding Indictment 2-3); and he did not contest the sufficiency of the indictment on the ground that it should have specified the source of the judgment. The district court denied the motion. Pet. App. A18-A23. The jury convicted petitioner on all four counts.

3. The court of appeals affirmed. Pet. App. A1-A13. First, it concluded that Section 1014 reached the false statements petitioner had made to influence settlement negotiations on the judgment debt arising from his defaulted loan from the bank. Pet. App. A2-A6. The court observed that Section 1014 has been construed broadly, to include false statements made after a bank

loan had issued, when the false statements were made in order to delay civil litigation. Pet. App. A5-A6. The court then ruled that "[t]here is no logical basis for a distinction between making misstatements to a bank to delay litigation and making misstatements to obtain a favorable settlement after judgment." Pet. App. A6. The court also rejected petitioner's contention that the indictment was fatally defective because it referred only to petitioner's judgment debt instead of referring to a "judgment debt arising from a defaulted loan." In the court's view, the indictment was sufficently clear and definite. Pet. App. A6 n.4.

The court of appeals next concluded that the evidence was sufficient to sustain petitioner's conviction for submitting a fraudulent loan application to the Marine Midland Bank (Count 4). Although the court recognized that it was petitioner's agent who actually submitted the application to Marine Midland Bank, the court noted that the evidence showed that petitioner ratified the agent's act and that petitioner intended to defraud that bank. Pet. App. A9-A13.

ARGUMENT

1. Petitioner contends first (Pet. 9-20) that Counts 1 through 3 of the indictment, which charged him with making false statements during his settlement negotiations with the bank, failed to state an offense. Specifically, he argues that Section 1014 does not reach the making of false statements during negotiations to settle a judgment on a defaulted bank loan. Furthermore, he claims that the indictment was fatally vague because it did not allege that the judgment against him related to a defaulted bank loan. Neither contention has merit.

Section 1014 is very broad: it reaches a false statement made in connection with any "application * * * commitment, or loan." In *Williams* v. *United States*, 458 U.S. 279, 288-289 (1982), this Court stated that Section 1014 reaches false statements "made in connection with conventional loan or related transactions."[1] See *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978) ("The purpose of § 1014 was to cover all undertakings which might subject the FDIC insured bank to risk of loss."). The courts of appeals have held that Section 1014 reaches false statements made to a bank for the purpose of influencing bank action in connection with a bank loan even after the defendant has obtained the loan. See *United States* v. *Kindig*, 854 F.2d 703, 706 (5th Cir. 1988); *United States* v. *Gardner*, 681 F.2d 733 (11th Cir. 1982); *United States* v. *Baity*, 489 F.2d 256, 257 (5th Cir. 1973). Cf. *United States* v. *Goberman*, 458 F.2d 226, 229 (3d Cir. 1972) (Section 1014 does not apply only to those "false statements which are actually used in the decision to make a loan," but to all statements "which have the capacity to influence" the federal lending institution). In *Gardner*, the court held that Section 1014 reaches the conduct of a person who made a false statement to a bank to prevent it from filing a civil suit to recover an overpayment previously made to him. As the court of appeals explained here (Pet. App. A6), there is no relevant difference between the *Gardner* situation and this case, where petitioner's false statements were made after the bank obtained a judgment against petitioner following his default. Thus, the court of appeals

[1] The *Williams* case concerned "check kiting," an offense the Court determined not to fall under Section 1014 because depositing checks that were not supported by sufficient funds does not involve either the making of a false statement or the overvaluing of any property or security.

correctly concluded that petitioner's conduct fell within Section 1014.

Petitioner's attack on the indictment is equally without merit. Under Fed. R. Crim. P. 7(c)(1), an indictment need only be a "plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need not contain * * * any other matter not necessary to such statement." Rule 7(c) was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *United States* v. *Debrow*, 346 U.S. 374, 376 (1953). An indictment is ordinarily sufficient if it contains the elements of the offense, fairly informs the defendant of the charge, and enables him to avoid a future prosecution for the same offense on double jeopardy grounds. *United States* v. *Bailey*, 444 U.S. 394, 414 (1980); *Hamling* v. *United States*, 418 U.S. 87, 117-118 (1974). To meet this standard, the language of the statute may be used in the description of an offense, provided that it is " 'accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' " *Hamling*, 418 U.S. at 117-118 (quoting *United States* v. *Hess*, 124 U.S. 483, 487 (1888)).[2]

The indictment in this case met that standard. First, Counts 1 through 3 tracked the language of Section 1014 by alleging that petitioner made his false statements in

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[2] As this Court has put it, "the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense." *Armour Packing Co.* v. *United States*, 209 U.S. 56, 84 (1908). Such a situation may occur, for example, where criminal intent is an element of a crime but is not mentioned in the statute. See 1 C. Wright, *Federal Practice and Procedure* § 125, at 375-377 & n.39 (2d ed. 1982) (citing cases).

connection with a request and "application" to settle the $123,413.58 judgment obtained against him by the bank. Thus, the indictment explicitly stated every essential element of the offense.[3] Second, by identifying the amount of the judgment and by stating that the judgment had been obtained by the bank, the indictment clearly indicated that the debt at issue was the product of petitioner's defaulted bank loan.[4] Finally, the indictment was sufficiently specific, particularly when considered along with rest of the record, to ensure that petitioner could avoid a second

[3] Contrary to petitioner's contention (Pet. 15), the indictment did not have to specify that the debt involved a defaulted bank loan. While the parties could, and did, litigate the scope of Section 1014, there is no requirement that an indictment must incorporate all interpretations of a provision supported by the case law. Although the court of appeals characterized the nature of the debt underlying the judgment as "an essential element of the case" (Pet. App. A6 n.4), that merely meant that in the court's view the judgment had to arise from a loan in order for the judgment to be within the reach of Section 1014. It did not mean that the origin of the judgment—a matter of the court's interpretation of the statutory language—had to be included in the charging language in order for the indictment to state an offense.

[4] The district court did not err in instructing the jury (Pet. App. A3) that false statements to a federally insured bank during negotiations to settle "a judgment" could constitute a crime under 18 U.S.C. 1014. See Pet. 15. The scope of the statute was a question of law for the court, and both the district court and the court of appeals correctly determined that the statute covered an application to settle a judgment debt based on a defaulted loan to a bank. Even if the statute covers only those "judgments" that are based on defaulted loans to a bank, the district court's instruction concerning "a judgment" was not misleading, because the only evidence before the jury concerned a judgment debt which, as petitioner repeatedly had conceded (see Def's Mem. in Support of Def's Mot. to Dismiss the Indictment 5; Def's Mem. in Support of Def's Mot. to Dismiss the Superseding Indictment 2-3; see also Pet. C.A. Br. 8, 28), stemmed from a defaulted bank loan.

prosecution for the same offense. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 764 (1962).

The decision below does not conflict with any decision of this Court or with the decision of any other court of appeals. For example, in *United States* v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988) (en banc), the court held only that an indictment that charged the offense of conspiracy to commit racketeering was fatally defective because it failed to charge the interstate commerce element of the racketeering statute. The other cases cited by petitioner likewise stand for the proposition that an indictment must state each statutory element of a charged offense, or that an indictment lacking an essential allegation is not cured by a citation to the charged statute.[5] In this case, by contrast, the indictment alleged each statutory element of the charged offense.

2. There is no merit to petitioner's final contention (Pet. 20-22) that he may have been convicted of an offense that was not charged in the indictment. Count 4 of the indictment clearly alleged that petitioner made false statements "with intent to and for the purpose of influencing the action of the Marine Midland Bank." Pet. App. A17. That allegation matched the special verdict form on which the jury convicted petitioner, and the evidence supported that conviction. As the court of appeals explained (Pet. App. A9-A13), the evidence showed that although petitioner did not actually submit the fraudulent applica-

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[5] See, *e.g.*, *United States* v. *Zangger*, 848 F.2d 923 (8th Cir. 1988) (indictment failed to allege that mailed matter was "obscene"); *United States* v. *Pupo*, 841 F.2d 1235 (4th Cir.), cert. denied, 109 S. Ct. 113 (1988) (indictment failed to allege that acts were done "knowingly" or "intentionally"); *United States* v. *Wabaunsee*, 528 F.2d 1 (7th Cir. 1975) (indictment failed to allege requisite knowledge); *United States* v. *Berlin*, 472 F.2d 1002 (2d Cir.), cert. denied, 412 U.S. 949 (1973) (same).

tion to the Marine Midland Bank, petitioner ratified the action of an agent who did in fact submit the application to that bank. The indictment did not charge, and the jury was not asked to find, that petitioner committed the separate crime of making a false application to the Peoples National Bank. Petitioner was therefore not convicted of a crime other than the one charged in the indictment.

Nor did the district court's instructions introduce any improper ambiguity with respect to Count 4. The court correctly instructed the jury that a defendant need not know, when he submits a false application, "what particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank." See Pet. 21. That instruction was clearly correct, and it did not make it possible for the jury to convict petitioner based on his application to the Peoples National Bank. The indictment and the special verdict form ensured that the jury in fact convicted petitioner of the crime charged in the indictment—submitting a false statement to the Marine Midland Bank.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 88-1710

In The

Supreme Court of the United States

October Term, 1989

THOMAS H. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Can an indictment attempting to charge violations of 18 USC § 1014 by false statements to a bank "in connection with a request and application to settle an outstanding judgment," but lacking allegations of an underlying bank loan within the purview of the statute, be treated as noticing or incorporating that conceded "essential element" by its closing recital, "in violation of Title 18, United States Code, Section 1014"?

II. Can such an indictment be so remedied by the Court of Appeals when the conceded "essential element" was omitted also from the trial court's instructions to the jury defining the offense, which instead declared, "False statements to a federally insured bank during negotiations to settle a judgment can constitute a crime under 18 U.S.C. Section 1014"?

III. Was the accused denied Fifth and Sixth Amendment rights to trial on a Grand Jury indictment when, on a charge that he knowingly and willfully made or caused false statements to *Bank B* with intent to influence that bank on a loan application to that bank, and on proofs susceptible of either that finding or that he made and intended statements only to *Bank A* by an application form he sent only to *Bank A*, the trial court instructed the jury, "It is not necessary, however, to prove . . . that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank"?

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PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

Replying on Questions I and II (counts 1, 2 and 3):

1.

The heart of the Eleventh Circuit's remedy for this Grand Jury indictment, otherwise deficient for want of a conceded "essential element," is found in the Court's footnote 4, Pet. A6, n. 4. The Government too speaks of this only in a footnote, Brief Op. p. 7, n. 3, saying "the indictment did not have to specify that the debt involved a defaulted bank loan"; that what the Court said in its footnote 4 "merely meant that in the court's view the judgment had to arise from a loan in order for the judgment to be within the reach of Section 1014"; that the Court "did not mean that the origin of the judgment . . . had to be included in the charging language in order for the indictment to state an offense." Gov't Brief Op. p. 7, n. 3.

The suggested distinction between what the Court "merely meant" and "did not mean" eludes us. The Court's footnote 4 seems lucid and purposeful enough. The Court said and meant that the antecedent loan element was "essential" so, in the Government's phrase, it "had to be included in the charging language." That was deemed accomplished by the indictment's closure phrase referring to § 1014.

Clearly enough, the Court of Appeals exemplified what it was doing by citation to *United States v. Stefan*, 784 F.2d 1093 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986), where "willfulness" was (arguably) missing from the indictment but was noticed by the Court in the statute by

virtue of a closure phrase, "in violation of 18 USC § 1001." In *Stefan's* antecedents was a Fifth Circuit decision, *United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981) (*see* Pet. Cert. pp. 16-17), which illustrated the methodology more dramatically than did *Stefan*, but not more so than here in Greene's case.

The Court's reasoning was utterly without guile: Greene's indictment needs the "essential element" of an antecedent loan, more so even than Stefan's indictment needed willfulness. "This reasoning," the Court's own reasoning, the Court said (862 F.2d at 1515, Pet. A6 n. 4),

> makes the nature of the debt underlying the judgment an essential element of the case. For example, if Greene had hit the bank with his truck, lost a damage suit, and then lied to get a better settlement, section 1014 would not be implicated. Lying to a bank during settlement negotiations on a judgment is only a federal crime when a loan underlies the debt judgment.

An "essential element" being missing, the Court supplied it to the indictment according to the accustomed methodology of *Stefan* and *Varkonyi, Id.*:

> Greene argues that the indictment is fatally defective for alleging only a judgment debt and failing to allege a "judgment debt arising from a defaulted loan." We find the indictment sufficiently definite and clear, certainly providing Greene with "adequate notice of the charges against him." *United States v. Stefan*, 784 F.2d 1093, 1102 (11th Cir. 1986) (indictment found adequate in spite of failure to specifically allege essential element of willfulness in prosecution under 18 U.S.C.A. § 1001).

2.

The Government is in error saying Greene "did not contest the sufficiency of the indictment on the ground that it should have specified the source of the judgment" (Gov't Brief Op. p. 3, also p. 7 fn. 4). [The Court of Appeals made no such suggestion obviating a need to find in the statute an "essential element" omitted from the indictment.] Greene moved to dismiss the first indictment, alleging only "a request to settle an outstanding judgment," R1-1-1, 2, 3, as follows. R1-62-3:

> 13. Counts One, Two and Three fail to allege that the alleged false statements were made in connection with "any application, advance[,] discount, purchase, purchase agreement, re-purchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefor . . . " as required by Title 18, U.S.C.A. §1014.

In support of that motion to dismiss Greene argued, R1-66-4: "It is the contention of the defendant in the instant case that 'a request to settle an outstanding judgment' is not one of the listed activities in §1014."

When the Government then got a superseding indictment supplying *its* choice of "one of the listed activities in § 1014" – "a request and *application* to settle an outstanding judgment," Pet. A14 e.a. – Greene attacked that allegation as well, saying R1-84-3, 4:

> The Government, in its superseding indictment, added the word "application." This is the only change in an attempt to charge the offense under §1014. So for the first time, the Government has selected one of the listed words in the statute, about which the defendant is alleged to have made a false

> statement, i.e., an "application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor. . . ."
>
> The Government, in relying upon the listed word of "application," clearly misunderstands the clear intent of § 1014. . . .

By argument before and after he secured the new indictment, the prosecutor sought to bolster the charge by referring to an underlying loan not alleged – to which Greene replied that no such loan would survive merger in the judgment already described by the indictment. Def. Mem. in Support of Def. Mot. to Dismiss the Superseding Indictment, R1-84-2, 3, 6. The Government now asserts, Brief. Op. p. 7 n. 4, that Greene "conceded" an antecedent loan in those early District Court arguments. This novel waiver theory is not found in the Court of Appeals decision of which conflict review is sought. That decision in no way suggests that in-chambers argument over the significance of anticipated proof can take the place of a Grand Jury indictment charging all essential elements.

Indeed as the Petition demonstrates pp. 4 and 5, the "loan" element was a fugitive in the trial court, in or out of the offense depending on the Government's pleasure from time to time. The antecedent loan disappeared when the court instructed the jury on essential elements, and when the jury convicted Greene. It reappeared only when useful to affirm the conviction – when the Court of Appeals acknowledged "this reasoning makes the nature of the debt underlying the judgment an essential element of the case," and the Court by closure phrase magic

exemplified in *Stefan* borrowed the missing element from the statutory laundry list.

There could be no more suitable case for examining the vitality of this Court's Fifth and Sixth Amendment doctrine as established these many years.

Replying on Question III (count 4).

Question III pertaining to count 4 should be taken for review with Questions I and II because the vitality of Fifth and Sixth Amendment standards for indictments depends quite as much on Petit Juries being expected to respect the essential allegations made by Grand Juries, as on Grand Juries being expected, themselves, to allege those essential elements.

The Government says the trial court did not dispense with an essential allegation in Count 4 by telling the Petit Jury it was unnecessary for the Government to prove as the Grand Jury charged (Pet. A17) that Greene "knowingly and willfully" made or caused a false statement to Marine Midland Bank on an application form that Greene himself sent only to the bank whose form it plainly was, Peoples Bank of Rockland.

The jury instruction, R18-257-205 e.a., was this:

> *It is not necessary, however, to prove* that the institution involved was, in fact influenced or even misled, or that they relied on the document in question, or *that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank.*

Again, the gist of this offense or crime is an intent to influence *such an institution* by willfully

making a false statement or report concerning the matter.

The Government says this instruction "did not make it possible for the jury to convict petitioner based on his application to the Peoples National Bank," Gov't Br. Op. p. 9, because "the indictment and the special verdict form ensured that the jury in fact convicted petitioner of . . . submitting a false statement to the Marine Midland Bank."

The indictment "ensured" nothing of the kind. After hearing the trial judge declare "It is not necessary, however, to prove . . . that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank," such a finding wasn't "ensured" by the special verdict form, either.

In fact, the verdict form was entirely consistent with the trial court having declared "it is not necessary, however," to prove the Grand Jury charge that Greene "knowingly and willfully" made or caused false statements to Marine Midland as distinguished from Peoples. The verdict form simply excised "knowingly and willfully" from the indictment (R4-196, e.a.):

COUNT IV GUILTY X NOT GUILTY ___

If you find the defendant guilty as to Count IV, please specify which statement(s) have been the basis of your verdict:

(1) That THOMAS H. GREENE *did submit and caused to be submitted* an application for a loan to the Marine Midland Bank, N.A., which stated in substance that he had no unsatisfied judgments against him within the last seven years, whereas in truth and

in fact, THOMAS H. GREENE, then well knew he did have unsatisfied judgments against him within the last seven years.

YES X NO ___

(2) That THOMAS H. GREENE *did submit and cause to be submitted* an application for a loan to the Marine Midland Bank, N.A., which stated in substance that his only debt was a $137,000 debt to Security First Federal Savings and Loan, Daytona Beach, Florida, whereas in truth and in fact, THOMAS H. GREENE, then well knew that he did have debts other than the $137,000 debt he reported.

YES X NO ___

CONCLUSION

This case is worthy of review on each of the three Questions Presented. The Eleventh Circuit's undermining of familiar Fifth and Sixth Amendment principles was no accident here, it was purposeful – the most striking instance yet of doctrine that, in that Circuit at least, radically alters settled law. Whether this Court is inclined to approve or not this closure phrase doctrine, the Court's superintendence of Constitutional jurisprudence requires that the Petition be granted.

Respectfully submitted,

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July 17, 1989.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1710

In The
Supreme Court of the United States

October Term, 1989

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THOMAS H. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Eleventh Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER SUPPORTING PETITION FOR WRIT OF CERTIORARI

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Petitioner Greene respectfully asks leave to call to the Court's attention the relevant discussion by Justice Blackmun's opinion (unanimous on this point) in Schmuck v. United States, ___ U.S. ___, 109 S.Ct. 1443, 103 L.Ed.2d 734 (Mar. 22, 1989). Rule 22.6. (We must acknowledge the availability of this authority to us at the time of filing petitioner's reply brief, in July.)

Schmuck decided, of course, that the propriety of a jury instruction on lesser-included offenses depends not on some problematic "inherent relationship" between the lesser and the charged offenses but on whether all the elements of the lesser are among those composing the greater.

The decisive principle, the Court held, is that under the Constitution the accused "cannot be held to answer" a charge composed of elements not charged by his

indictment. 109 S.Ct. at 1451, 103 L.Ed.2d at 747:

> It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. See Ex Parte Bain, 121 U.S. 1, 10 (1887); Stirone v. United States, 361 U.S. 212, 215-217 (1960); United States v. Miller, 471 U.S. 130, 140, 142-143 (1985). This stricture is based at least in part on the right of the defendant to notice of the charge brought against him. United States v. Whitaker, 144 U.S. App. D. C., at 350-351 447 F.2d, at 320-321.

That precisely is the burden of Greene's petition, which asks the Court to restore that principle to the Eleventh Circuit where now it is held, United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981), United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986), but most dramatically in Greene itself, that an indictment's closing reference to the statute supplies from the statute a missing essential element.

Schmuck describes in practical terms the prejudice likely to occur if one looks

elsewhere than to the indictment for the elements composing the greater offense charged. Id., 109 S.Ct. at 1459, 103 L.Ed.2d at 734:

> Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. Specifically, . . . the defendant may not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment.

The scenario imagined in Schmuck was the reality of Greene's indictment, trial and appeal on counts One, Two and Three, from which he is entitled to be discharged; and on count Four on which he is entitled to a new trial.

Respectfully submitted,

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